

STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition	:	
of	:	
WILLETS POINT CONTRACTING CORP.	:	
for Revision of a Determination or for Refund	:	
of Sales and Use Taxes under Articles 28 and 29	:	
of the Tax Law for the Period September 1, 1979	:	
through February 28, 1983.	:	

DETERMINATION

In the Matter of the Petition	:
of	:
WILLETS POINT CONTRACTING CORP.	:
AND K. TULLY, AS OFFICER	:
for Revision of a Determination or for Refund	:
of Sales and Use Taxes under Articles 28 and 29	:
of the Tax Law for the Period March 1, 1983	:
through May 31, 1986.	:

Petitioner Willets Point Contracting Corp., 127-50 Northern Boulevard, Flushing, New York 11368, filed a petition for revision of a determination or for refund of sales and use taxes under Articles 28 and 29 of the Tax Law for the period September 1, 1979 through February 28, 1983 (File No. 801023).

Petitioners, Willets Point Contracting Corp. and K. Tully, as officer, 127-50 Northern Boulevard, Flushing, New York 11268, filed a petition for revision of a determination or for refund of sales and use taxes under Articles 28 and 29 of the Tax Law for the period March 1, 1983 through May 31, 1986 (File No. 804320).

A hearing was held before Robert F. Mulligan, Administrative Law Judge, at the offices of the Division of Tax Appeals, Two World Trade Center, New York, New York on December 9, 1987 at 1:15 P.M., with all briefs to be submitted by January 25, 1988. Petitioners appeared by Peter K. Tully, Esq. The Audit Division appeared by William F. Collins, Esq. (Lawrence A. Newman, Esq., of counsel).

ISSUE

Whether petitioner Willets Point Contracting Corp. is entitled to an exemption from sales and use taxes with respect to machinery and equipment and fuel and electricity used in the production of asphalt for municipal paving contracts.

FINDINGS OF FACT

1. Petitioner Willets Point Contracting Corp. ("the corporation") is a general contractor performing paving work for governmental agencies such as the City of New York Department of Highways, The Port Authority of New York and New Jersey, the Triborough Bridge and Tunnel Authority and the New York State Department of Transportation.

2. The corporation owns and operates an asphalt plant which produces asphalt used by the corporation in fulfilling its obligations under paving contracts.

3. (a) On March 9, 1984 the Audit Division issued a Notice of Determination and Demand for Payment of Sales and Use Taxes Due to the corporation for \$53,859.70 in tax, plus interest, for the period September 1, 1979 through February 28, 1983.

(b) On December 17, 1986 the Audit Division issued notices of determination and demands for payment of sales and use taxes due to the corporation and "Mr. K. Tully, President" for \$75,917.33 in tax, plus interest, for the period March 1, 1983 through May 31, 1986.

4. Petitioners have raised no issue with respect to any liability on the part of Mr. K. Tully, as officer of the corporation. In fact, Mr. Tully's full name does not appear in the record.

5. (a) The assessments were based on purchases of equipment, tools, replacement parts, fuel and electricity used by the corporation in the operation of the asphalt plant.

(b) The corporation paid the 4% portion of the tax applicable to New York City under Article 29 of the Tax Law but did not pay the 4¼% due to the State and Metropolitan Transportation District under Article 28 on the basis that said purchases were used or consumed in the production of "tangible personal property for sale" and thus exempt.

The Bids and Specifications

6. Approximately 96% of the corporation's sales volume consists of paving contracts with the governmental agencies noted in Finding of Fact "1". The majority of its sales volume is with the City of New York Department of Highways.

7. The City of New York Department of Highways' standard Proposal For Bids requires the price for each particular item to be set forth in the bid and the total for all items to be set forth. The bid form reads as follows:

"BID _____

The total of the foregoing bid based on the Engineer's Estimate of Quantities given hereinabove is:

(A) Total bid for all consumable materials which will become a permanent part of the finished structure\$ _____

(B) Total bid for all other costs of installation, including consumable supplies which will not become a permanent part of the finished structure.....\$ _____

(C) Total aggregate bid (In Words) _____

Dollars (\$ _____).*

*Note: Bidders shall insert the prices bid for each of the classifications and the above totals both in words and figures. In case of any discrepancy between the price in words and that in figures, the price in words will be considered binding."

8. The proposal for bids and bid for contract number THW-111-R, which is in evidence, states that it is for:

"Repaving With 3-Inch Asphaltic Concrete On A New 6-Inch
Concrete Base And Laying Of Water Mains
BROADWAY-ROEBLING ST. TO MARCY AVE.
BROADWAY-RODNEY ST. TO DEKALB AVE.
Together With All Work Incidental Thereto
BROOKLYN"

The bid format established by the City of New York Department of Highways breaks the bid into six classifications and indicates the engineer's estimate of quantities for comparing bids. The quantities and classifications with respect to the above-mentioned contract are as follows:

<u>Quantity</u>	<u>CLASSIFICATION</u>
50,500 square yards	Asphaltic Concrete Wearing Course, 3"
300 tons	Binder Mixture
400 tons	Asphaltic Concrete Mixture
8,400 cubic yards	6" Concrete Base, Class C-25
75 linear feet	Reset Granite Curb
360 linear feet	Concrete Curb

9. The City of New York Department of Highways' Standard Specifications provide, in section 1.01.5(B) that the contractor, when bidding, should not include an amount to cover New York State or New York City Sales and Use Taxes. Said section provides in pertinent part, as follows:

"(B) Sales and Use Taxes. The following text is inserted for the purpose of complying with and obtaining the exemption provided by Section 1115(a)(15) of the New York State Tax Law, as added by Laws of 1969, Chapter 473, from New York State Sales Tax and Compensating Use Tax, for the purchase of materials required by this contract, except materials consumed by the Contractor in the performance thereof. The Contractor, when bidding, should not include an amount to cover such New York State or New York City taxes.

(a) The City of New York (City) is exempt from payment of Federal, State, local taxes and Sales and Compensating Use Taxes of the State of New York and of cities and counties on all materials and supplies sold to the City pursuant to the

provisions of this contract. These taxes are not to be included in bids. However, this exemption does not apply to tools, machinery, equipment or other property leased by or to the Contractor or a subcontractor, or to supplies and materials which, even though they are consumed, are not incorporated into the completed work (consumable supplies), and the Contractor and his subcontractors shall be responsible for and pay any and all applicable taxes, including Sales and Compensating Use Taxes, on such leased tools, machinery, equipment or other property and upon all such unincorporated supplies and materials.

(b) The Contractor agrees to sell and the City agrees to purchase all supplies and materials, other than consumable supplies, required, necessary or proper for or incidental to the construction of the project covered by the Agreement. The sum paid under the Agreement for such supplies and materials shall be in full payment and consideration for the sale of such supplies and materials under the Agreement.

* * *

(c) The purchase by the Contractor of the supplies and materials sold hereunder shall be a purchase or procurement for resale and therefore not subject to the New York State or New York City Sales or Compensating Use Taxes or any such taxes of cities or counties. The sale of such supplies and materials by the Contractor to the City is exempt from the aforesaid sales or compensating use taxes. With respect to such supplies and materials, the Contractor, at the request of the City, shall furnish to the City such bills of sale and other instruments as may be required by it, properly executed, acknowledged and delivered assuring the City title to such supplies and materials, free of liens or encumbrances, and the Contractor shall mark or otherwise identify all such materials as the property of the City.

(d) Title to all materials to be sold by the Contractor to the City pursuant to the provisions of the contract shall immediately vest in and become the sole property of the City upon delivery of such supplies and materials to the site and prior to its becoming a part of the permanent structure. Notwithstanding such transfer of title, the Contractor shall have full and continuing responsibility to install such materials and supplies in accordance with the provisions of the Agreement, protect them, maintain them in a proper condition and forthwith repair, replace and make good any damage thereto, theft or disappearance thereof, and furnish additional materials in place of any that may be lost, stolen or rendered unusable, without cost to the City, until such time as the work covered by the contract is fully accepted by the City. Such transfer of title shall in no way affect any of the Contractor's obligations hereunder. In the event that, after title has passed to the City, any of such supplies and materials are rejected as being defective or otherwise unsatisfactory, title to all such supplies and materials shall be deemed to have been transferred back to the Contractor."

Production of Asphalt

10. The asphalt used in paving by the corporation is manufactured at the corporation's asphalt plant.

The proposal for bids establishes general specifications for the type of material needed for a particular job. The corporation submits a mix design depending on the use and purpose and on

the type and quality of ingredients available. The ingredients consist of stone, sand and asphalt cement. The stone and sand are unloaded from barges or taken from stockpiles brought into the corporation's plant by truck. The stone and sand are stored in hoppers, then fed onto conveyer belts for transfer to a dryer where moisture is removed. Hot asphalt cement is then added to the mixed stone and sand. The mixture is either dumped directly onto a truck for delivery to a job site or conveyed to a hot storage silo where it can be kept from 24 to 36 hours and then placed in trucks for delivery to a job site. All trucks are weighed before leaving the plant.

Street Paving

11. When the corporation delivers the asphalt to the job site, the material is inspected and tested by the engineer in charge or his representative. When accepted, it is placed in the corporation's paving machine and applied to the street by employees of the corporation, under the direction of the engineer in charge for the City of New York.

12. The tax at issue herein is that claimed to be due on the purchase of equipment and parts and also fuel and electricity used in the asphalt plant. There is no issue as to any tax on ingredients, labor or paving equipment.

SUMMARY OF THE PARTIES' POSITIONS

13. Petitioners contend that the machinery, equipment, fuel and electricity used in the asphalt plant were used in the production of tangible personal property for sale and that petitioner is thus entitled to the manufacturer's exemptions set forth in Tax Law §§ 1115(a)(12) and 1115(c). Petitioners' principal argument is that the asphalt was delivered to the City and other governmental agencies at the job sites and that the City and other agencies took title prior to the commencement of paving. Petitioners point out that subsequent to the period in issue, the corporation, at the suggestion of the Sales Tax Bureau, formed a separate corporation to operate the asphalt plant to circumvent the problem.

14. The Audit Division claims that the contracts at issue are actually lump sum capital improvement contracts and that the corporation is the ultimate consumer of the material and consequently is not entitled to the manufacturer's exemptions.

CONCLUSIONS OF LAW

A. That Tax Law § 1115(a)(12) provides, in pertinent part, that receipts from the following shall be exempt from sales and use taxes imposed under Article 28 of the Tax Law:

"Machinery or equipment for use or consumption directly and predominantly in the production of tangible personal property...for sale, by manufacturing, processing...."

B. That Tax Law § 1115(c) provides, in pertinent part, that the following shall be exempt from sales and use taxes under Article 28 of the Tax Law:

"Fuel, gas, electricity...for use or consumption directly and exclusively in the production of tangible personal property...for sale, by manufacturing, processing...."

C. That while the proposals for bids issued by the City of New York required a breakdown of separate prices for materials and labor and the offering bids so specifically stated such prices,

the labor (i.e., paving) was not merely incidental to the manufacture and sale of asphalt. The City of New York did not seek to purchase asphalt separately from labor but sought a completed paving job. Accordingly, the asphalt was manufactured by the corporation for its own use in fulfilling paving contracts, not for "sale" (see, Southern Tier Iron Works, Div. of Cives Corp. v. Tully, 66 AD2d 921).

It is noted that courts have deemed somewhat similar contracts to be time and materials contracts as opposed to lump sum contracts for purposes of an exemption for sales of material for public works (see, Sweet Associates v. Gallman, 36 AD2d 95, affd 29 NY2d 902). Sweet Associates can be distinguished from the instant case on the basis that the former involved a contract for construction for a school district entered into prior to September 1, 1969, the effective date of Tax Law § 1115(a)(15)¹, which provided an exemption from sales and use taxes for tangible personal property sold to a contractor for use in a capital improvement performed for an exempt organization. While the Appellate Division found that the contract was a "time and materials" contract and not a "lump sum" contract, and that the materials were resold to the school district and thus tax exempt, the decision is clearly founded on the intent of the parties that sales tax was not to be included in the bid estimate and that the real beneficiary of the tax exemption was the school district itself (Sweet Associates v. Gallman, supra, at 100). The statute at issue here, Tax Law § 1115(a)(12), however, benefits a manufacturer, not an exempt customer of the manufacturer, and thus Sweet Associates is inapplicable.

D. That the petitions of Willets Point Contracting Corp. and K. Tully, as officer, are denied and the notices of determination and demands for payment of sales and use taxes due issued on March 9, 1984 and December 17, 1986 are sustained.

DATED: Albany, New York
September 29, 1988

/s/ Robert F. Mulligan
ADMINISTRATIVE LAW JUDGE

¹Added by Laws of 1969 (ch 473) as amended by Laws of 1971 (ch 221) applicable retroactively to September 1, 1969.